

CITY OF STAUNTON
VIRGINIA

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January 7, 2020

VIA E-MAIL to: district24@senate.virginia.gov

The Honorable Emmett Hanger, Senator
Commonwealth of Virginia
P.O. Box 2
Mount Solon, VA 22843

Dear Emmett,

As a courtesy, I'm attaching a copy of the January 3, 2020 letter I sent to Delegate-Elect John Avoli. I make the same request of you that I made of John and hope you will promote respect for the Court, the Judge, our City and our City Council members—and the rule of law.

We ask that you and John actively oppose Senate Bill 314, and any similar legislation, which apparently seeks to undermine the Court and the presiding judge as well as the City. Moreover, I believe it is unconstitutional special legislation.

Respectfully,

A handwritten signature in black ink, appearing to be "D. Guynn", written over a horizontal line.

Douglas L. Guynn

P.S. I'm also attaching a copy of Mr. Wirth's December 30, 2019 letter for further context.

C: The Honorable Carolyn W. Dull, Mayor
The Honorable John Avoli, Delegate-Elect

Enclosures

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January 3, 2020

The Honorable G. John Avoli, Delegate-Elect
114 Bowie Street
Staunton, VA 24401

Dear John,

I didn't get to see you when you and Emmett met with the Staunton City Council last month. Let me, however, take this opportunity to wish you well in your latest public service, now at the statewide level. You deserve tremendous credit for being willing to make this commitment. Moreover, your experience at the local level, including service as Mayor of the City, should serve you well and help you and others understand even better the challenges that face local government bodies and their leaders.

I also write to you to be sure that you're aware of an experience from last year's General Assembly session that was very surprising and disappointing. It's connected to the City's efforts to uphold the rule of law and even-handed regard for the Staunton City Code's clear zoning requirements—regardless of whether a property is located in the north end or another part of the City and regardless of whether someone has raw political muscle at disposal. I expect you already are aware of the underlying matter, given your own connections, but it seems constructive to share these thoughts with you.

The City unfortunately has had to deal over the last 10 years or so with what, in my view, amounts to a rogue board of zoning appeals (BZA), which now has been reversed by the Staunton Circuit Court in four separate cases—and for the second time as to the very same wall and the same Staunton City Code zoning requirements. The three reversals are highlighted in Judge Irvine's January 4, 2009 letter opinion and the fourth reversal, just last month, in Judge Ricketts' December 2, 2019 letter opinion. Again, the Circuit Court has agreed with the City each and all of the four times that the City has had to challenge the BZA's actions in unlawfully granting variances.

Let me offer some more historical context. Not too long after I began service as City Attorney, my view was—and has been—that the then-constituted Staunton BZA appeared not to follow the applicable provisions of the Virginia Code, as required by the oaths of the members. Instead, its members left the impression that personal political orientation and philosophical preferences colored their official decision-making on issues

that came before the Staunton BZA. As you know, BZA members are appointed by the Circuit Court, not by City Council. My concern was—and has been—not whether the BZA might disagree with the City zoning staff on occasion but that the BZA had developed a culture of doing what its members personally preferred rather than what the law required. At one or more meetings, BZA members openly showed disdain for clearly controlling law. That is tantamount to lawlessness, in my view, and evidences a disregard for the rule of law, as established not only by the elected General Assembly but also by the elected City Council. As I recall sharing with the BZA when I appeared before it to represent the City, if its members personally didn't like a particular zoning law, they should seek outside the BZA proceedings to argue to Council to change the law or seek through election to change those who make the law—or even run for City Council. Most of those same BZA members, despite the City's multiple offers to pay for the cost of continuing education, even refused to take the certification training offered statewide for BZA members.

With the fully informed support of City Council, the City has had to devote the resources to get four BZA variance decisions judicially reviewed—and reversed, as I mentioned. The first one involved three property owners, two with vinyl fences and another with the masonry block wall on Augusta Street. In the first appeal to the Circuit Court, the Court (Judge Irvine) agreed with the City's position and reversed the BZA in all three cases. Afterwards, with City staff repeatedly offering to work with the property owners, to transition into compliance, the property owners of the two fences were cooperative; the property owner with the masonry wall, however, stalled and stalled and refused to comply or compromise, requiring the City to institute further judicial proceedings in the Circuit Court. The Supreme Court of Virginia found that the Augusta Street property owner should get yet a second opportunity to argue before the BZA under a new application for a variance because the general variance law had changed; but the Supreme Court did not rule or comment on whether a variance should be granted.

After the Supreme Court decision, the property owner was given that very chance to make a new case for a variance from the BZA under the general variance law that the General Assembly had changed in the meantime. So, in 2018, the Augusta Street wall owner was afforded yet another BZA hearing, and two members of the same previously reversed BZA and one other, with two members dissenting, voted 3-2 to grant a variance—again—from the City's zoning restrictions. The City appealed that decision to the Circuit Court in 2018. The City and the Circuit Court, however, repeatedly were delayed until Fall 2019 from having a hearing on the variance because the property owner's lawyer invoked his special legislative privilege as a General Assembly member. The General Assembly member employed the tactic of a legislative-privilege continuance not less than 12 times to stall related proceedings. It's fair to infer that the stonewalling allowed time for uniquely special interest—and I still believe unconstitutional—legislation to be ushered through the General Assembly to try to rob Staunton citizens of the right—through their City representatives—to appeal the BZA's procedurally and substantively unlawful variance decision.

Rather than go into more detail, I refer you to the City Council's webpage which provides a City perspective using a format of Q's and A's. I enclose a copy for your ease of reference.

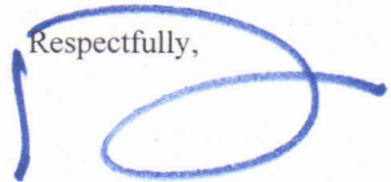
At this point, as City Attorney, I write to highlight this history so you might be better informed and to ask that you decline to be part of repeating the misguided favoritism of special, uncoded legislation that, in all truthfulness and reality, benefitted only the Augusta Street property owner, as intended. I also ask you to inform City Council itself sufficiently in advance of any legislative effort by anyone who would seek, again, to interfere with pending judicial proceedings involving this matter. As I'm sure you'll agree, it's vital that the judiciary be able to perform, without undue deference to special interests, its important role in our system of government and that legislation not be geared to benefit (or punish) one specific party in ongoing litigation. To do otherwise is to send a message to citizens that our judiciary—and the judges who serve it—are merely part of the political playing field, not removed from partisan actions.

I understand that there may be individuals, aside from the property owner, who don't agree with the position of the City. I respect the right or privilege of anyone to have divergent views from those of the City. At the same time, I believe it's not right for another legislative body to try to trump the elected City Council by interfering with pending judicial proceedings and, most fundamentally, is contrary to the rule of law—in a word, wrong. It also is an affront to the judiciary and to Staunton citizens who expect the zoning laws to be followed as written.

I'm glad to share with you that the City of Staunton's newest BZA members take their duties to follow and apply the law with a sincere commitment to the rule of law, not the rule of personal philosophical or political preference. And they have all gladly taken and completed the statewide training for BZA members. Even when they disagree with City staff, those standing before them and all Staunton citizens will have the reassurance that they diligently sought to discharge their oath of office—and there should be much less need or impetus to appeal the BZA's decisions.

Thanks for your time. I'm always glad to talk with you. Again, best wishes for your service in the General Assembly. I know your family, including grandchildren, must be proud. I'm sure Ken ("Coach") is smiling, too.

Respectfully,



Douglas L. Guynn

Enclosures

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FAQS: ILLEGAL WALL

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Font Size:

FAQS

When did this issue begin?

In 2008, the Staunton Board of Zoning Appeals (BZA) erroneously and unlawfully granted variances, or special treatment, from longstanding provisions and interpretation of the City Code that reasonably limit the height of fences and walls and restrict the construction of fences and walls at the intersection of two streets.

There are valid and obvious public safety reasons for those restrictions, such as safe sight distance for motorists, the safety of police and other first responders when approaching property hidden behind a wall, and preservation of the open residential character of the neighborhood. No other property owner in the neighborhood has a similar wall.

Three Staunton property owners were granted variances by the BZA in 2008 – two were issued variances for illegal fences, and one variance was issued for an illegal wall. As a result of the BZA's unlawful decisions, the City sought judicial review and intervention by the Staunton Circuit Court to correct and reverse the decisions of the BZA to grant special treatment in those cases.

The Circuit Court invalidated the BZA's actions in all three cases, concluding in its June 17, 2009 Final Order "that the decisions of the Staunton Board of Zoning Appeals to grant each of the three variances are REVERSED; and that the three variance applications are hereby denied."

City staff endeavored to work cooperatively with the owners of the illegal wall and the two other property owners of illegal fences after the 2009 circuit court ruling. The owners of the illegal fences worked cooperatively with City zoning staff and voluntarily undertook to bring their fences into compliance with the City's zoning law.

The owners of the illegal wall, however, ultimately did not cooperate, despite repeated communications through letters and other efforts over the years by City staff to get cooperation in accord with the circuit court's original ruling that reversed the BZA. The wall has remained in violation of the City's zoning restrictions on the location and height of walls and fences in residential areas since it was built 10 years ago.

Why has the City continued to pursue legal action about the illegal wall over the last 10 years?

The City actually has repeatedly tried to reach a conclusion long before now, as City Council's most recently

adopted resolution reflects. Following some further judicial proceedings in the Circuit Court, the Supreme Court of Virginia issued a decision that authorized the property owner to have yet another hearing before the BZA despite the extensive prior proceedings and the Circuit Court's reversal of the BZA unlawful variance actions in 2009.

The zoning administrator, the City of Staunton, and the Council of the City of Staunton believe that once again the BZA's action to grant a variance on June 12, 2018, was unlawful—and once again, the BZA's action merits judicial review, as recommended by the City's legal counsel.

Uniform enforcement of the zoning provisions of the Staunton City Code is important. It is the City's obligation and firm conviction that zoning laws should be applied consistently to all citizens of the City, regardless of where the property may be located, regardless of the standing or identity of the property owner, and regardless of who may represent the property owner. The City's commitment to the consistent application of the law has not changed.

How much has the City spent on legal fees in court?

The City has had to expend substantial resources in seeking judicial review and intervention by the Staunton Circuit Court to correct and reverse the unlawful decisions of the BZA and to seek enforcement. So far, in this matter which has been ongoing for 10 years, paid legal fees for the law firm's services taking the lead on the court and more recent BZA proceedings amount to \$86,328.92 since 2014.

The BZA's actions on June 12, 2018 will cause the City to incur further expense to defend the City's zoning laws and uphold what are believed to be the reasonable provisions of the City Code that a BZA is not allowed, in effect, to amend by the vote of three people who gave no reasons and analysis for the quick vote and allowed no discussion among the BZA members. Two of the BZA members voted against the variance, and the City believes these two members honored and applied the law.

Has the City tried to resolve this issue outside of court?

Yes. Since the Circuit Court's 2009 ruling that reversed the BZA's unlawful decisions, the City has sought voluntary compliance by the property owner numerous times. The City has repeatedly expressed a desire to work cooperatively with the property owner to achieve substantial compliance and has continued to seek compliance by communications through at least 10 letters over an extended period of years to no avail.

The City also offered a compromise: the property owner could lower the hollow cinderblock wall at the mortar joint just above the maximum height of 3 ½ feet, and the City would have its employees load the pieces removed with City equipment and dispose of the pieces and other debris at no charge.

It appeared beyond a reasonable doubt to City staff that despite efforts to get voluntary compliance, the property owner ultimately would not comply with the City Code and would continue to seek further delay. Consequently, the zoning administrator and the City had no choice but to pursue Council-authorized formal civil injunctive enforcement proceedings through the Circuit Court to assure substantial compliance. Even then, again, the City offered the compromise, which the property owner refused to accept and, in effect, then chose to continue the dispute.

Has the property owner of the illegal wall made any efforts to come into compliance with the City's zoning laws?

No. The property owner has continued in violation of the City's zoning laws for approximately 10 years, despite the City's efforts to achieve compliance, and has repeatedly sought special treatment, despite the City's clearly written zoning laws.

The property owner also sought to have the zoning administrator, in effect, modify the law under the City Code so that the property owner would not be required to comply with provisions that generally have applied to other properties in the City of Staunton in similar situations. The zoning administrator properly declined, concluding that he had no authority to override laws enacted by the City Council and so notified the property owner's legal counsel.

The property owner says a member of the City's staff gave her permission to build the wall. Didn't the City make a mistake?

[Read an excerpt from the June 12, 2018 BZA hearing](#) regarding what the property owners were told by the City.

The City's restrictions on walls and fences are clearly stated in the City Code, readily accessible and understandable by anyone reading the Code online. The City believes the property owners were initially provided with accurate information—that the City Code clearly prohibited the high wall; however, for some reason, they later approached a different member of the city's staff who provided inconsistent information about the City's zoning laws.

The City recognizes that there was one City employee who apparently failed to reinforce accurately the obligation to follow the plainly written City zoning laws, while, at the same time, another employee originally provided them with accurate information on the matter. Still, no different than someone who might ask the City's Chief of Police for permission to violate a posted City speed limit, no City employee—not the Chief of Police, the City Manager, or the Mayor—can authorize violation of City laws.

Furthermore, in September of 2007, while the wall was under construction, City staff visited the property owner at the property to issue a notice of violation and a stop-work order. At that time, the wall was not complete; in fact, City staff testified to stepping over a portion of the wall to walk to the front door of the home to issue the stop-work order. Nevertheless, the property owner continued with the construction of the wall.

Why wouldn't City Council just drop it all and avoid incurring any further expense?

City Council's resolution summarizes its reasons for adopting the resolution to seek judicial review. While the City could avoid spending any more resources at this time by not pursuing the appeal to the Staunton Circuit Court, the City believes that the BZA's decision—yet once more—was unlawful, and the zoning laws deserve to be defended and it is only the means of judicial review that provides that opportunity.

Importantly, others have to respect the City's zoning laws. There is a larger cost to Staunton citizens, who rely on those zoning laws to protect their neighborhoods, if there is no judicial review of a bare majority 3-2 vote of the BZA that with a quick vote essentially writes an exception into those laws.

[More FAQs ►](#)



COUNCIL NEWS

Circuit Court Judge Supports City's Appeal in Illegal Wall Case

DECEMBER 5, 2019 — Finally this week—after the political ploys for the property owner's advantage—the Circuit Court ruled, again, in favor of the City. [Read the Circuit Court's nine-page letter opinion](#). It is unfortunate that, now, for a second time, the Circuit Court has had to intervene to correct the BZA's unlawful decision that has cost the City in time and other resources.

Originally Posted: 12/05/2019 12:25 PM

Last Updated: 12/05/2019 12:27 PM

[Return to full list >>](#)

December 30, 2019

Via Hand Delivery

The Hon. Charles L. Ricketts, III, Judge
City of Staunton Circuit Court
113 E. Beverley St. 3rd Floor
Staunton, VA 24401

In Re: *June 12, 2018 Decision*
Case No. CL18000404-00

Dear Judge Ricketts:

In compliance with your December 2, 2019 letter opinion in this case we drafted an Order and provided the same to counsel for the defendant via email on Tuesday, December 17, 2019, with objection in the draft by such counsel "as related to denying the motion to dismiss and to reversing / overturning the BZA" and requesting endorsement by the end of that week. I followed up, again via email, on December 23, 2019, but in neither instance have we received a reply.

We do not know whether Mr. Obenshain intends to again assert the provisions of Code §30-5 in an effort to avoid entry of such an Order. Regardless, any effort to do so should not prevent the Court from proceeding to finalize this matter. A summary of such continuances in this case and in the related injunction and mandamus proceedings is enclosed.

With that in mind, and in compliance with the aforesaid letter opinion, enclosed please find a Final Order, for entry. The Order dispenses with the requirements of Rule 1:13, but preserves counsel's right to note objections for ten days following entry.

Respectfully,



John C. Wirth

Encl.

cc: Mark D. Obenshain, Esq. and Justin M. Wolcott, Esq. (w/encl.) (Via Fax and Mail)

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Continuances filed by Mark Obenshain in the *Chilton-Belloni* proceedings

Case CL14000311-00 (Injunction Proceedings)

- February 18, 2015 Letter to the Court with an assertion of § 30-5 with respect to his responses to requests for admissions
- January 4, 2017 filed Motion and Notice of Continuance Pursuant to Virginia Code § 30-5 (Filed with Virginia Supreme Court)
- January 8, 2018 filed Motion and Notice of Continuance Pursuant to Virginia Code § 30-5 in response to Plaintiff's Praecipe
- November 4, 2019 filed Motion and Notice of Continuance Pursuant to Virginia Code § 30-5 in response to Plaintiff's Praecipe
- December 9, 2019 filed Motion and Notice of Continuance Pursuant to Virginia Code § 30-5 in response to Plaintiff's Praecipe

Case CL15000173-00 (Petition for Writ of Mandamus)

- January 8, 2016 filed Motion and Notice of Continuance Pursuant to Virginia Code § 30-5 after Notice of Appeal to the Supreme Court of Virginia

Case CL1800040400 (Petition for Writ of Certiorari)

- August 10, 2018 filed Motion and Notice of Continuance Pursuant to Virginia Code § 30-5 in response to Petitioners' request for responsive pleadings
- September 10, 2018 filed Motion and Notice of Continuance Pursuant to Virginia Code § 30-5 in response to Plaintiff's Praecipe
- October 9, 2018 filed Motion and Notice of Continuance Pursuant to Virginia Code § 30-5 in response to Plaintiff's Praecipe
- November 13, 2018 filed Motion and Notice of Continuance Pursuant to Virginia Code § 30-5 in response to Plaintiff's Praecipe
- January 3, 2019 filed Motion and Notice of Continuance Pursuant to Virginia Code § 30-5 in response to Plaintiff's Praecipe
- February 8, 2019 filed Motion and Notice of Continuance Pursuant to Virginia Code § 30-5 in response to Plaintiff's Praecipe
- March 4, 2019 filed Motion and Notice of Continuance Pursuant to Virginia Code § 30-5 in response to Plaintiff's Praecipe

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF STAUNTON

**IN RE: JUNE 12, 2018 DECISION OF THE BOARD OF ZONING APPEALS OF
THE CITY OF STAUNTON, VIRGINIA**

CITY OF STAUNTON, VIRGINIA, et al.

Petitioners

v.

Case No. CL18000404-00

DEBRA CHILTON-BELLONI

Respondent

FINAL ORDER

This matter is before the Court on the Petition (the Petition) filed by the City of Staunton, Virginia, the City Council of the City of Staunton, Virginia and Rodney S. Rhodes, Zoning Administrator, all by counsel, appealing the June 12, 2018 decision of the Board of Zoning Appeals of the City of Staunton (that Board being herein referenced as the BZA) granting the application of Debra Chilton-Belloni (Ms. Chilton-Belloni) for a variance concerning her real estate identified as 1403 North Augusta Street (the Property) in the City of Staunton, as well as on the Motion to Dismiss Writ of Certiorari and Appeal (the Motion) filed by Ms. Chilton-Belloni, by counsel.

On September 3, 2019 the parties and counsel appeared before the Court for oral argument on the Motion. Upon consideration of the arguments of counsel, both oral and written, the Court issued a letter opinion on September 17, 2019. That letter opinion, a copy of which is attached hereto and incorporated herein by reference, ruled upon the Motion in part, but refrained upon a full ruling on the merits of the Motion until further evidence could be heard.

On October 8, 2019 the parties and counsel came before the Court again on the Motion

and also for trial on the Petition. A trial was conducted, at which time the Court took evidence from the parties and heard argument of counsel.

The Court FINDS that uncodified HB 2420, passed during the 2019 session of the Virginia General Assembly and signed into law by the Governor, does not have the effect of rendering the matters at issue in this case moot, nor of rendering the wall at issue in this case a valid nonconforming use or otherwise prohibiting that wall's compulsory compliance with the zoning laws of the City of Staunton. Accordingly, and for the reasons stated in this Court's letter opinion in this case of December 2, 2019, a copy of which opinion is attached hereto and incorporated herein by reference, the Motion is DENIED.

The Court further FINDS that Ms. Chilton-Belloni failed to present a hardship which would entitle her to a variance and that the BZA failed to make specific findings such as are required by the Virginia Code prior to the BZA's granting of a variance. Accordingly, and for the reasons stated in the aforementioned December 2, 2019 letter opinion, the City of Staunton has established by a preponderance of the evidence that the BZA was plainly wrong in granting Ms. Chilton-Belloni a variance and the BZA erred in doing so.

Whereupon, having considered the record of the BZA, all evidence submitted by the parties, the written legal memoranda and oral arguments of counsel, and for the reasons set forth in the aforesaid December 2, 2019 letter opinion, the Court ADJUDGES, ORDERS and DECREES that the Petition is GRANTED, the June 12, 2018 decision of the BZA in granting Ms. Chilton-Belloni a variance is hereby REVERSED and Ms. Chilton-Belloni's application for such a variance is DENIED.

Counsel for the Petitioners has represented that counsel for the Respondent has had opportunity since December 17, 2019 to endorse the Final Order. In the exercise of its discretion, the Court dispenses with compliance with Rule 1:13 of the Rules of the Supreme Court of Virginia with respect to this Final Order, but counsel for Respondent may note any objections to it within ten (10) days following entry of this Final Order. Nothing further to be done, this case is closed.

ENTER: _____

DATE: _____

Seen and objected to because, though the Court correctly dismissed and denied Ms. Chilton-Belloni's application for a variance and granted the petitioners the relief they seek in their Petition, the BZA's approval of the application was erroneous for reasons beyond those cited in the Court's letter opinion of December 2, 2019. Specifically:

1. The variance sought by Ms. Chilton-Belloni was not a reasonable deviation from those provisions of the Zoning Ordinance regulating the size or area of a lot or parcel of land, or the size, area, bulk or location of a building or structure.
2. Ms. Chilton-Belloni did not assert, nor did the evidence establish, a need for a variance which would not be shared generally by other properties.
3. Granting the variance requested by Ms. Chilton-Belloni was contrary to the public interest.
4. There are no special conditions in this matter which would cause a literal enforcement of the provisions of the Zoning Ordinance to result in unnecessary hardship.
5. Granting the variance requested by Ms. Chilton-Belloni fails to observe the spirit of the Zoning Ordinance.
6. Ms. Chilton-Belloni did not show that there is (or was) any exceptional narrowness, shallowness, size or shape of the Property at the time of the effective date of the Zoning Ordinance, or exceptional topographic conditions or other extraordinary situation or condition of the property, or of the condition, situation, or development of property immediately adjacent thereto.
7. Ms. Chilton-Belloni did not show that the strict application of the Zoning Ordinance would effectively prohibit or unreasonably restrict the utilization of the property.
8. Granting the variance requested by Ms. Chilton-Belloni amounts to a special privilege or convenience sought by Ms. Chilton-Belloni.
9. Strict application of the Zoning Ordinance would not produce undue hardship

relating to the property.

10. Ms. Chilton-Belloni failed to demonstrate the existence of a hardship which would not be shared generally by other properties in the same zoning district and in the same vicinity.

11. Ms. Chilton-Belloni failed to demonstrate that authorization of the variance she seeks would not be of substantial detriment to adjacent property, nor that it would not be of substantial detriment to nearby properties in the proximity of that geographical area.

12. The character of the district would be changed by the granting of the variance sought by Ms. Chilton-Belloni.

13. Ms. Chilton-Belloni has not demonstrated that the condition or situation of the property is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the Zoning Ordinance.

14. Granting the relief requested by Ms. Chilton-Belloni would not be a reasonable deviation from those provisions regulating the size or area of a lot or parcel of land or the size, height, area, bulk, or location of a building or structure.

15. Ms. Chilton-Belloni did not assert, nor did the evidence establish, a hardship which would not have been created by herself, as the applicant for the variance.

16. In purporting to grant Ms. Chilton-Belloni a variance, the BZA erred in failing to make any findings of fact and/or law to support its grant of such a variance, and in failing to make those findings of fact and/or law required by statute and/or other applicable law.

17. The decision of the BZA in purporting to grant Ms. Chilton-Belloni a variance was illegal and applied erroneous principles of law.

18. HB 2420, passed during the 2019 session of the Virginia General Assembly and signed into law by the Governor, is invalid and illegal special legislation, in violation of, and contrary to, the Virginia Constitution.

19. HB 2420, passed during the 2019 session of the Virginia General Assembly and signed into law by the Governor, does not have retroactive effect and therefore cannot apply to the wall at issue in this case.

Nelson, McPherson, Summers & Santos, L.C.

By: 

Victor M. Santos (VSB No. 16233)

✓ John C. Wirth (VSB No. 37334)

P.O. Box 1287
Staunton, VA 24402-1287
Tel.: 540-885-0346
Fax: 540-885-2039

Counsel for Petitioners

TWENTY-FIFTH JUDICIAL CIRCUIT
OF VIRGINIA

CHARLES L. RICKETS, III
CHIEF JUDGE
GEORGE M. COCHRAN JUDICIAL CENTER
113 EAST BEVERLEY STREET
STAUNTON, VIRGINIA 24401



STAUNTON
PHONE (540) 332-3870
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COUNTIES
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CITIES
BUENA VISTA, COVINGTON
LEXINGTON, STAUNTON AND WAYNESBORO

September 17, 2019

Victor M. Santos, Esquire
John C. Wirth, Esquire
Nelson, McPherson, Summers & Santos, L.C.
P.O. Box 1287
Staunton, VA 24402

Mark D. Obenshain, Esquire
Justin M. Wolcott, Esquire
420 Neff Avenue, Suite 130
Harrisonburg, VA 22801

Re: City of Staunton, Virginia, *et al.* v. Debra Chilton-Belloni
CL18000404-00
Motion to Dismiss Writ of Certiorari and Appeal

Gentlemen:

This matter came before the Court on Debra Chilton-Belloni's Motion to Dismiss Writ of Certiorari and Appeal ("the Motion"). Oral argument was held before the Court on September 23, 2019. While the parties have recited certain facts in their respective briefs, based mainly on prior proceedings, no evidence has been taken in this case. The Motion was grounded on the passing of HB 2420 ("the Uncodified Act") in the 2019 Session of the Virginia General Assembly, which, if applicable, would cause the issue in this case to be moot. For the following reasons, the Uncodified Act is valid general legislation and has retroactive effect. The Court can rule on the issues of law raised in the motion, however, the Motion will be taken under advisement until evidence can be heard on whether the Uncodified Act applies to the wall at issue in this case based on the evidence presented.

ANALYSIS

The Uncodified Act is valid general legislation.

The City of Staunton argues that the Uncodified Act cannot apply to the wall at issue in this case because the Uncodified Act is invalid and illegal special legislation.

Article IV, Section 14 of the Constitution of Virginia states that the "General Assembly shall not enact any local, special, or private law . . . granting to any . . . individual any special or exclusive right, privilege, or immunity." The Supreme Court of Virginia has explained that, "[a] law is general though it may immediately affect a small number of persons, places or things, provided, under named conditions and circumstances, it operates alike on all who measure up to its requirements." *W.S. Carnes, Inc. v. Board of Sup'rs of Chesterfield Cty*, 252 Va. 377, 384 (1996). In addition, the Court has stated that, "a law is 'special' in a constitutional sense when it contains an inherent limitation that arbitrarily separates some persons, places, or things from those on which, without such separation, it would also operate." *Id.*

The Court explained that the ordinances at issue in *W.S. Carnes* were general laws because, by their plain wording, they operated alike on any individual or entity who obtained a building permit for new residential construction. The purpose of the ordinances may have been to benefit county residents who sustained certain damage to their homes. However, the Court noted that the purpose of the ordinances could not change their content or effect. "[E]vidence of the Board's intent or motive in enacting ordinances is irrelevant to our consideration whether they are valid laws." *Id.* at 385.

Here, the Uncodified Act is general legislation. It may immediately affect a small number of persons under named conditions, but it operates alike on all who measure up to its requirements. There is no inherent limitation that arbitrarily separates persons. The motive and intent behind the enactment of the Uncodified Act is irrelevant in considering its validity. Nothing prevents the Uncodified Act's application to others besides Ms. Chilton-Belloni and those outside the City of Staunton. "If a statute applies throughout the Commonwealth to all persons and property within the class specified and the classification is reasonable and not arbitrary, then that statute is not 'special' but 'general.'" *Newport News v. Elizabeth City Cty.*, 189 Va. 825, 842 (1949).

For these reasons, the Uncodified Act is valid general legislation.

The Uncodified Act has retroactive effect.

The City of Staunton argues that the Uncodified Act does not apply to the wall at issue in this case because the Uncodified Act does not have retroactive effect.

"There is a presumption that statutes operate prospectively." *Gloucester Realty Corp. v. Guthrie*, 182 Va. 869, 873 (1944). "It is elementary that retrospective statutes affecting past transactions are not generally favored by the courts. A settled rule of construction is that they are not to be construed retrospectively unless plainly so intended." *Id.*

However, "this Court has never required that the General Assembly use any specific form of words to indicate that a new statute or amendment to an existing statute is intended to be applied retroactively. . . . Rather, we look to the context of the language used by the legislature to determine if it 'shows it was intended to apply retroactively and prospectively.'" *Board of Sup'rs of James City Cty. v. Windmill Meadows, LLC*, 287 Va. 170, 180 (2014) (quotations omitted).

Here, the language of the Uncodified Act contemplates retroactive application. It states, in part, that "such a wall, had it been constructed as described in clauses (ii) and (iii) after 2017, would be considered a valid nonconforming use not subject to removal." The Uncodified Act was signed into law in 2019. The language quoted above, however, discusses walls built *before* 2017 that, had they been built *after* 2017, would be considered a valid nonconforming use. Under the City's view of the Act, this language would be unnecessary because all walls built under the law would necessarily mean all walls built after the 2019 effective date of the Uncodified Act. The language quoted above clearly does not support that conclusion. Because no specific form of words is required to indicate retroactivity, and because context plays a large role in determining retroactive intent, the lack of specific language in the Uncodified Act regarding retroactivity is not determinative.

For these reasons, the Uncodified Act has retroactive effect and is not invalid for that reason.

CONCLUSION

The Court withholds a decision on the Uncodified Act's application to the wall at issue in this case, and the Motion is taken under advisement until evidence can be heard on these issues. For the reasons above, however, Ms. Chilton-Belloni's Motion to Dismiss is not denied on the grounds that the Uncodified Act is invalid special or retroactive legislation.

Thank you for your attention to this matter.

Sincerely,



Charles L. Ricketts, III

CLR,III/epl

Cc: Clerk of Court

TWENTY-FIFTH JUDICIAL CIRCUIT
OF VIRGINIA

CHARLES L. RICKETS, III
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December 2, 2019

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In re: June 12, 2018, Decision of the Board of Zoning Appeals of the City of Staunton
City of Staunton, Virginia, *et al.* v. Debra Chilton-Belloni
CL18000404-00

Gentlemen:

This matter came before the Court on the City of Staunton's appeal of the June 12, 2018, decision of the Board of Zoning Appeals of the City of Staunton ("BZA") and Debra Chilton-Belloni's Motion to Dismiss Writ of Certiorari and Appeal ("the Motion"). Oral argument on the Motion was held on September 3, 2019. The Court issued a letter opinion on September 17, 2019, addressing part of the Motion. The rest of the Motion was taken under advisement until further evidence could be heard. The Motion was grounded on the passing of HB 2420 ("the Uncodified Act") in the 2019 Session of the Virginia General Assembly, which, if applicable, would cause the issue in this case to be moot. A hearing on the City's appeal was held on October 8, 2019, at which evidence regarding the Motion was also heard.

This letter opinion addresses the remaining issues from the Motion as well as the City's appeal. For the following reasons, this Court finds that the Uncodified Act does not apply to the

wall at issue in this case. Ms. Chilton-Belloni's Motion to Dismiss is denied. The Court also finds that the BZA did not apply erroneous principles of law. However, the Court finds that the City of Staunton has rebutted the presumption of Virginia Code Ann. § 15.2-2314, and the BZA erred in its decision to grant a variance in this case.

MS. CHILTON-BELLONI'S MOTION TO DISMISS

The Motion's remaining issue is whether the Uncodified Act applies to the wall at issue in this case. For the following reasons, the Uncodified Act does not apply in this case, and the Motion is denied.

ANALYSIS

The Uncodified Act was passed in the 2019 Session of the Virginia General Assembly. The Uncodified Act states:

A wall built on residential property shall be grandfathered as a valid nonconforming use, and the wall shall not be subject to removal solely due to such nonconformity, in any instance where (i) a residential property owner sought local government approval prior to 2008 for construction of a wall on the owner's property, (ii) the property owner was informed by a local official that such wall required no permit and that the structure would comply with the zoning ordinance, (iii) the wall was thereafter constructed, (iv) the locality subsequently informed the property owner that the wall was illegal, and (v) such a wall, had it been constructed as described in clauses (ii) and (iii) after 2017, would be considered a valid nonconforming use not subject to removal.

Ms. Chilton-Belloni must meet these five requirements for the Uncodified Act to apply to the wall at issue. Requirements (i), (ii), (iii), and (iv) of the Uncodified Act are easily met or uncontested. Accordingly, the Court will briefly discuss these elements together. Requirement (v) will be discussed separately below.

Uncodified Act Requirements (i), (ii), (iii), and (iv)

The evidence in this case establishes that the Bellonis were residential property owners of the home located at 1403 North Augusta Street, Staunton, Virginia ("the Property"), prior to 2008. The wall at issue in this case was constructed in 2007, and the events that form the focus of this dispute occurred between 2006 and 2007. While the parties dispute exactly who the Bellonis did or did not speak with regarding approval to build the wall, it is undisputed that they sought approval from the City of Staunton prior to 2008. Accordingly, Ms. Chilton-Belloni has shown that she and her husband were residential property owners and sought local government approval prior to 2008 for construction of the wall on their property.

The record reflects that the Bellonis met with Earl Thompson, a deputy building official, prior to construction of the wall. In a 2008 BZA hearing regarding the wall, Dr. Belloni testified that he met with Mr. Thompson at the Property sometime in the fall of 2006. At that time, Mr. Thompson walked the property along Ridgeview Road and North Augusta Street. According to Mr. Thompson, wall construction had not begun at that time.

Regarding construction of the wall, Dr. Belloni testified that Mr. Thompson told the Bellonis that they could "have at it." In an October 12, 2011, criminal proceeding against the Bellonis regarding the wall, Mr. Thompson testified that he told the Bellonis that he "felt it would be okay" to build the wall behind the existing hedge. Mr. Thompson further stated that his "intent was that they could build a wall no taller than the hedge where the hedge was existing."

While Mr. Thompson may not have explicitly told the Bellonis that a permit was not required, the evidence establishes that he met with the Bellonis, reviewed their property, and informed them that, in his opinion, they could build the wall to the height of the existing hedge without any type of approval. The evidence shows that Ms. Chilton-Belloni and her husband were informed by a local official that their wall required no permit and that the wall would comply with the zoning ordinance if it was built no taller than the existing hedge.

The Bellonis received a notice of violation from the City of Staunton in late September 2007, after construction of the wall had begun and was near completion, and well after Mr. Thompson had met and discussed the wall with the Bellonis. Given the above, the Court finds that Ms. Chilton-Belloni has met requirements (i) through (iv) of the Uncodified Act.

Uncodified Act Requirement (v)

The fifth requirement of the Uncodified Act states that, "such a wall, had it been constructed as described in clauses (ii) and (iii) after 2017, would be considered a valid nonconforming use not subject to removal."

The reference to the year 2017 is important because Virginia Code Ann. § 15.2-2307, governing nonconforming uses, was amended in 2017. The amendment to subsection (D) added the following language:

If the structure is one that requires no permit, and an authorized local government official informs the property owner that the structure will comply with the zoning ordinance, and the improvement was thereafter constructed, a zoning ordinance

may provide that the structure is nonconforming but shall not provide that such structure is illegal and subject to removal solely due to such nonconformity.

Va. Code Ann. § 15.2-2307(D). Accordingly, § 15.2-2307 sets the standard for a “valid nonconforming use not subject to removal” that is required by the Uncodified Act. The relevant part of § 15.2-2307(D) in this case is whether the wall at issue was a structure that required no permit. Thus, the Court must look to the Staunton City Code to determine whether a permit was required for the wall.

Nothing in the Staunton City Code states that a permit is required for a wall. However, Section 15.10.010 provides that the “Virginia Uniform Statewide Building Code . . . is hereby adopted and incorporated herein as fully as if set forth at length herein and the provisions thereof shall be controlling in the construction and maintenance of buildings and structures within the area of jurisdiction of the city.” Because the Staunton City Code incorporates the Virginia Uniform Statewide Building Code (VUSBC), the Court must review the VUSBC to determine if it requires a permit for the construction of a wall.

Ms. Chilton-Belloni argues that the 2000 edition of the VUSBC applies because the 2003 edition, which went into effect on November 16, 2005, allows a *permit applicant* during the one-year period after November 16, 2005, to “choose whether to comply with the provisions of this code or the provisions of the code in effect immediately prior to November 16, 2005.” VUSBC, § 103.2. The 2000 edition was in effect immediately prior to November 16, 2005.

Ms. Chilton-Belloni cannot choose to comply with the 2000 edition because she is not a permit applicant. Section 103.2 of the VUSBC states that, “[c]onstruction for which a *permit application* is submitted to the local building department after November 16, 2005, shall comply with the provisions of this code, except for *permit applications*” that are submitted during the one-year period following November 16, 2005 (emphasis added). Only construction for which a permit application was submitted is entitled to comply with the 2000 edition of the VUSBC. Ms. Chilton-Belloni did not apply for a building permit for the wall, so she was not a permit applicant. Accordingly, the Court finds that the 2003 edition of the VUSBC applies to this case because Ms. Chilton-Belloni was not a permit applicant and the 2003 edition was in effect when the wall was constructed in 2007.

Section 108.1 of the 2003 edition of the VUSBC states that, “[a]pplication for a permit shall be made to the building official and a permit shall be obtained prior to the commencement of any of the following activities . . . 1. Construction or demolition of a building or structure” Section 108.2 of the 2003 edition exempts from application for permit, “fences and privacy walls not part of a building, structure or of the barrier for

a swimming pool, provided such fences and privacy walls do not exceed six feet in height above the finished grade.”

Here, the best evidence regarding the height of the wall is that the wall varies in height between six (6) and seven (7) feet. Tim Hartless has testified several times that he is 6 feet 4 inches tall and that the wall is taller than he is. In addition, photos from the record and hearings on these matters indicate that the wall is taller than Mr. Hartless.

The Court finds that a permit was required before construction of the Bellonis’ wall because the 2003 edition of the VUSBC applies in this case; the wall is a structure for which a permit would be required under the 2003 edition; and the City of Staunton has fully incorporated the VUSBC into their city code. In addition, because the wall required a permit, the Court finds that the wall is not a valid nonconforming use not subject to removal under § 15.2-2307(D). Ms. Chilton-Belloni cannot meet the final requirement of the Uncodified Act.

The Uncodified Act does not apply to the wall in this case, and Ms. Chilton-Belloni’s motion to dismiss is denied.

CITY OF STAUNTON’S APPEAL OF THE JUNE 12, 2018, DECISION OF THE STAUNTON BOARD OF ZONING APPEALS

STANDARD

Virginia Code Ann. § 15.2-2314 provides that a circuit court “may reverse or affirm, wholly or partly, or may modify the decision brought up for review.” The board of zoning appeal’s decision denying or granting a variance application is presumed to be correct. Va. Code Ann. § 15.2-2314. The petitioner must show, by a preponderance of the evidence, that the board of zoning appeals erred in its decision. *Id.*

ANALYSIS

Variance Requirements

The parties have disagreed about the proper version of the statutes applicable in this case. The relevant statutes are Va. Code Ann. § 15.2-2201 (defining variance) and § 15.2-2309 (providing boards of zoning appeals the power to grant variances). The parties argued this variance under the 2014 versions at the BZA as well as before this Court during the City’s appeal of the BZA’s decision. Accordingly, the Court will examine this case under the 2014 versions.

A variance is defined as

[A] reasonable deviation from those provisions regulating the size or area of a lot or parcel of land, or the size, area, bulk or location of a building or structure when the strict application of the ordinance would result in unnecessary or unreasonable hardship to the property owner, and such need for a variance would not be shared generally by other properties, and provided such variance is not contrary to the intended spirit and purpose of the ordinance, and would result in substantial justice being done.

Va. Code Ann. § 15.2-2201. Boards of zoning appeals have the power to grant variance applications when, because of special conditions, literal enforcement of an ordinance will result in unnecessary hardship, provided that the ordinance's spirit is observed and substantial justice done. Va. Code Ann. § 15.2-2309(2).

In observing an ordinance's spirit and ensuring that substantial justice is done, the power to grant a variance under § 15.2-2309(2) requires that:

[A] property owner can show that his property was acquired in good faith and where by reason of the exceptional narrowness, shallowness, size or shape of a specific piece of property at the time of the effective date of the ordinance, or where by reason of exceptional topographic conditions or other extraordinary situation or condition of the piece of property, or of the condition, situation, or development of property immediately adjacent thereto, the strict application of the terms of the ordinance would effectively prohibit or unreasonably restrict the utilization of the property or where the board is satisfied, upon the evidence heard by it, that the granting of the variance will alleviate a clearly demonstrable hardship, as distinguished from a special privilege or convenience sought by the applicant, provided that all variances shall be in harmony with the intended spirit and purpose of the ordinance.

Finally, § 15.2-2309(2) limits the power of the board by listing specific findings that must be made before a variance may be granted. A board must find:

[1] [T]hat the strict application of the ordinance would produce undue hardship relating to the property . . . [2] that the hardship is not generally shared by other properties in the same zoning district and the same vicinity[, and] [3] that the authorization of the variance will not be of substantial detriment to adjacent property and that the character of the district will not be changed by the granting of the variance.

The board must also find “that the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance.” *Id.*

Hardship

While the Virginia Code contains several requirements before a board may grant a variance, the most litigated issue, and the primary issue in this case, is whether the hardship requirement has been met.

Here, the City argues that the BZA erred in its decision because the hardship presented by Ms. Chilton-Belloni is not one which is contemplated by the Virginia Code. Ms. Chilton-Belloni argues that it would be a hardship to require her to bring her wall into compliance for a combination of two reasons. First, Mr. Thompson represented that the wall could be built without a permit, and the Bellonis relied on that representation. According to Ms. Chilton-Belloni, requiring that the wall be taken down after being told to build it is a hardship. June 12, 2018, Tr. at 105. Second, compliance with the ordinance would create a financial hardship because the costs in building and removing the wall would be burdensome. *Id.* at 108–09. Thus, the costs of building and removing the wall combined with the Mr. Thompson’s representation that a permit was not needed creates a hardship which requires a variance.

Before addressing whether the hardships advanced by Ms. Chilton-Belloni are those contemplated by the Virginia Code, the Court notes that the BZA failed to make specific findings required by the Virginia Code. As noted above, a board is required to make specific findings before granting a variance. In this case, the BZA failed to make these findings. While Ms. Chilton-Belloni submitted proposed findings, the BZA failed to adopt them. For purposes of this appeal, the Court assumes that the BZA’s votes in favor of granting the variance means that the BZA made the findings required in § 15.2-2309(2).

The Supreme Court of Virginia, as well as the General Assembly, have addressed whether erroneous decisions by building officials confer any rights on the affected individual. In *Segaloff v. City of Newport News*, the Court stated that “a building permit . . . issued in violation of law . . . confers no greater rights upon a permittee than an ordinance itself, for the permit cannot in effect amend or repeal an ordinance, or authorize a structure at a location prohibited by the ordinance.” 209 Va. 259, 261 (1968).

In 1995, the General Assembly enacted a vested rights provision to eliminate the hardship property owners may have suffered from their reliance on erroneous or void zoning decisions. See Va. Code Ann. § 15.2-2311(C); *Bd. of Sup’rs of Richmond Cty v. Rhoads*, 294 Va. 43, 51 (2017). The vested rights provision “manifestly creates a legislatively-mandated limited exception to the judicially-created general principle that a building permit issued in violation of applicable zoning ordinances is void.” *Rhoads*, 294 Va. at 52.

Although this case does not involve an erroneously issued building permit, the general principle still applies. According to the evidence, Mr. Thompson, a building official, represented to the Bellonis that a permit was not needed for the construction of the wall. However, as discussed above regarding the Uncodified Act, a permit was required for construction of the wall.

Mr. Thompson, although perhaps meaning well, did not have the authority to grant the Bellonis permission to build the wall in violation of the City's zoning ordinances. Granting a building permit is preceded by the application for and consideration of such permit. It is a process that can take some time. If the general principle is that an erroneously issued building permit does not confer rights upon the applicant, the same can be said for the erroneously delivered verbal statements of a building official. Furthermore, the vested rights exception to the general principle does not apply in this case. This is not a hardship contemplated by the Virginia Code.

The Supreme Court of Virginia has also addressed whether financial considerations create the type of hardship contemplated by the Virginia Code. The Court has made clear that financial considerations alone do not create the type of hardship required by the code.

The Supreme Court of Virginia has held that financial loss alone cannot establish an exceptional hardship approaching confiscation, but that it "is a factor or an element to be taken into consideration and should not be ignored." *Natrella v. Bd. of Sup'rs of Arlington Cty*, 231 Va. 451, 458 (1986). In *Baum v. Lunsford*, the Supreme Court held that financial loss alone cannot establish a hardship, even under a lesser burden of proof of an "undue hardship." 235 Va. 5, 8 (1988).

It is clear, then, that the financial loss Ms. Chilton-Belloni faces if her variance application is denied is, standing alone, not enough to establish a hardship under Virginia Code, but it should be considered. Considering both financial loss and the reliance on Mr. Thompson's statements together, Ms. Chilton-Belloni has failed to establish a hardship contemplated by the Virginia Code. Each of the two hardships claimed by Ms. Chilton-Belloni are hardships that have been held to not meet the requirements for granting a variance.

While this Court sympathizes with Ms. Chilton-Belloni, and without expressing an opinion as to whether the wall should be removed, this Court finds that the City of Staunton has met their burden of showing, by a preponderance of the evidence, that the BZA erred in its decision granting Ms. Chilton-Belloni a variance. No hardship exists which would require or allow the granting of a variance in this case.

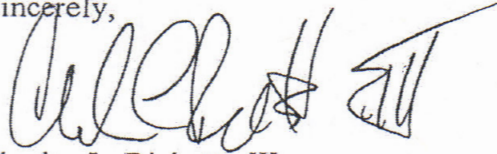
CONCLUSION

Ms. Chilton-Belloni's Motion is denied, and the Court finds that the BZA erred in its June 12, 2018, decision granting Ms. Chilton-Belloni a variance. The Court would respectfully

request that Mr. Santos prepare an order consistent with and incorporating this letter opinion and circulate the same for entry.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Charles L. Ricketts, III". The signature is stylized with large, flowing letters and a prominent flourish at the end.

Charles L. Ricketts, III

CLR,III/epl

Cc: Clerk of Court